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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 252

LAFAYETTE M. GRAY (ALSO KNOWN AS L. M. GRAY), PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 448–460) is reported at 174 F. 2d 919. The District Court's opinion denying petitioner's motion for judgment of acquittal (R. 372–380) is not reported.

JURISDICTION

The original judgment of the Court of Appeals, entered April 18, 1949 (R. 460), was modified on June 6, 1949 (R. 489), following the filing and denial of a petition for rehearing on behalf of the Government (R. 461–486). Petitioner's petition for rehearing with respect to the modi-

fied judgment of June 6, 1949 (R. 491–510), was denied July 14, 1949 (R. 511). The petition for a writ of certiorari was filed August 12, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTION PRESENTED

Whether the acquittal of petitioner on several specifications of misbranding and his conviction on others contained in the same counts, followed, on appeal by petitioner, by the reversal of the conviction by the Court of Appeals with directions to the District Court to discharge petitioner, and the subsequent modification by the Court of Appeals of its judgment so as to direct the District Court to grant a new trial, subjects petitioner to double jeopardy or otherwise prejudices his legal rights.

STATUTE INVOLVED

The Federal Food, Drug, and Cosmetic Act of June 25, 1938, c. 675, 52 Stat. 1040, provides in pertinent part:

> SEC. 201 [21 U. S. C. 321]. For the purposes of this Act—
>
> * * * * *
>
> (k) The term "label" means a display of written, printed, or graphic matter upon the immediate container of any article; and a requirement made by or under authority of this Act that any word, statement, or other information appear on the label shall not be considered to be complied with un-

less such word, statement, or other information also appears on the outside container or wrapper, if any there be, of the retail package of such article, or is easily legible through the outside container or wrapper.

* * * * *

(m) The term "labeling" means all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article.

SEC. 301 [21 U. S. C. 331]. The following acts and the causing thereof are hereby prohibited:

(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded.

SEC. 303 [21 U. S. C. 333]. (a) Any person who violates any of the provisions of section 301 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than $1,000, or both such imprisonment and fine; * * *

SEC. 502 [21 U. S. C. 352]. A drug or device shall be deemed to be misbranded—

(a) If its labeling is false or misleading in any particular.

* * * * *

(e) If it is a drug and is not designated solely by a name recognized in an official compendium unless its label bears (1) the common or usual name of the drug, if such there be * * *.

(f) Unless its labeling bears (1) adequate directions for use * * *.

STATEMENT

A criminal information in four counts was filed in the United States District Court for the District of Minnesota charging petitioner with violations of the Federal Food, Drug, and Cosmetic Act. The jury found petitioner not guilty on Count II, and the District Court dismissed Count IV during the trial. The issues raised on this petition for certiorari, therefore, relate to Counts I and III. Each of these counts (R. 1–2, 3–4) charged petitioner with violating Section 301 (a) of the Act by introducing and delivering for introduction into interstate commerce a misbranded drug. The drug, called "Powdr-X", was alleged in Count I to be misbranded within the meaning of (1) Section 502 (a), in that statements in a letter which accompanied the drug were false and misleading; (2) Section 502 (e) (1), in that its label failed to bear the common and usual name of the drug; and (3) Section 502 (f) (1), in that its labeling failed to bear adequate directions for use. The letter referred to in this count was addressed to the purchaser, recommended that Powdr-X be mixed with vaseline, and concluded by stating, "In fact it is an ointment that is splendid for almost any infection, abrasions, or ulcers" (R. 2, 43–44). It was the Government's position that this letter represented

and suggested that Powdr-X would be efficacious in the cure, mitigation, and treatment of almost any infection, abrasions, and ulcers, whereas in fact it would not be so efficacious, and that the statements, therefore, were false and misleading. In Count III, a different shipment of Powdr-X was alleged to be misbranded in a similar manner under Section 502 (a) and (e) (1), but there was no charge of misbranding under Section 502 (f) (1). The accompanying letter to the purchaser involved in this count (R. 113–114) stated: "We believe we have a good reason for expecting Powdr X to correct ulcers of the stomach. * * * Gas pains that usually accompany ulcers of the stomach should subside in a week or ten days." It was alleged that these statements represented and suggested that Powdr-X would be efficacious in the cure, mitigation, and treatment of ulcers of the stomach, whereas in fact it would not be so efficacious, and that the statements, consequently, were false and misleading.

Petitioner filed a motion to dismiss the information on the ground that each count charged more than one offense (R. 6–7). This motion was denied, but the District Court directed that Counts I and III be amended by adding at the conclusion of each the following statement: "it being the intent and purpose of the Plaintiff to charge hereunder only one interstate shipment and offense under the Food, Drug and Cosmetic Act" (R. 9).

In his instructions to the jury, the trial judge read to them forms of verdict which he had prepared for their use. In respect of Count I, the form of verdict was (R. 347–348):

> We, the jury in the above-entitled action, find the defendant, as charged in the first count of the Information, (blank) guilty of misbranding by introducing into interstate commerce a drug, to-wit, Powdr-X, with a label which was false and misleading; (blank) guilty of misbranding by introducing a drug, to-wit, Powdr-X, in interstate commerce which was not designated solely by a name registered in an official compendium and that its label failed to bear the common name of the drug, to-wit, pumice; (blank) guilty of misbranding by introducing into interstate commerce a drug, to-wit, Powdr-X, which failed to bear adequate directions for use.

A similar form of verdict on Count III was submitted to the jury (R. 348–349):

> We, the jury in the above-entitled action, find the defendant, as charged in the third count of the Information, (blank) guilty of misbranding by introducing into interstate commerce a drug, to-wit, Powdr-X, with a label which was false and misleading; and (blank) guilty of misbranding by introducing into interstate commerce a drug, to-wit, Powdr-X, which was not designated solely by a name recognized in an official compendium and that

its label failed to bear the common name of the drug, to-wit, pumice.

After the jury had retired to deliberate, government counsel suggested to the court that the word "labeling" be substituted in the forms of verdict for "label" in order to conform the forms to the charges of the information that the letters accompanying the drugs (which constituted labeling within the meaning of the Act (sec. 201 (m)), as distinguished from the labels themselves, contained representations which were false and misleading. Petitioner's counsel objected to any revision of the forms and the court rejected the suggestion, stating, "The jury can't possibly be misled by the form of verdict in so far as the term 'label' is concerned. Certainly I went into great detail, and at your suggestion, after the jury was charged, called their attention to the fact that the labeling was not only the labeling which appeared by way of letter which accompanied the shipment, but was that which was attached to the carton. I can't conceive that there is anything but a rather captious objection to the term 'label' as I used it in the verdict. Of course my only purpose in using it was to identify the count—the various misbranding counts that appear in the respective counts, so that they could intelligently follow the instructions and intelligently return a verdict. I don't think there is any real foundation for that." (R. 353–356.)

The jury found petitioner guilty on the first specification of misbranding set forth in the forms of verdict for Counts I and III (false and misleading representations) and not guilty on the remaining specifications in those counts (R. 11, 12).

Thereafter, petitioner filed a motion (R. 366–369) and an amended motion for judgment of acquittal on the ground, *inter alia*, that the jury's finding of guilty of misbranding in the "label," as stated in the form of verdict for each of Counts I and III, "constitutes a finding by the jury that the defendant was guilty of the offense of misbranding solely by a means with which the defendant was not and is not charged in the Information" (R. 370–371). In an opinion rejecting this contention (R. 372–380), the court said that "a consideration of the entire situation would indicate that the motion for judgment on this ground seems to be extremely hypercritical and captious" (R. 374). The court pointed out that in the instructions to the jury reference was made to the letters involved in Counts I and III and to the Government's contention that they constituted labeling, and that the jury were instructed that if they should find that the letters did accompany the drugs, and so constituted labeling, then the jury should determine whether such labeling was false and misleading. "Obviously," the court said, in the light of these instructions, "there was no possibility that the

jury did not understand that when the Court used the term 'label,' it was with reference to the letter." (R. 374–375.) The court also pointed out that "Days were spent in Court in endeavoring to decide whether or not the representations or statements made in these letters constituted a labeling which was false and misleading," and that "There was no contention that the label affixed to the carton itself contained any false and misleading statements. The only label or labeling which contained any false and misleading statements, according to the Government's evidence, was that which was set forth in the letters." The court concluded that "to suggest now that the forms of verdict, to which no objection was made by the defendant and which the defendant in fact approved by his objection to any change therein, constituted any prejudice to the defendant is a sheer afterthought and seems highly hypercritical." (R. 377.)

Judgment was entered on the verdicts and petitioner was sentenced generally on Counts I and III to pay a fine of $1,000, together with the costs of prosecution (R. 380–381).

On appeal, the Court of Appeals reversed the judgment on the grounds (1) that the District Court erred in requiring the jury to return a special verdict as to each specification of misbranding alleged in the counts submitted to them and (2) that the verdicts of guilty on the specifications in the forms of verdict of misbranding

"with a label which was false and misleading" were fatally defective in that, while false and misleading representations in either a label or labeling constitute misbranding, Counts I and III alleged misbranding, in this respect, only in the labeling, i. e., in the letters accompanying the shipments involved in those counts, with the result that the verdicts were not responsive to the charges (R. 448–460). The court ordered that the cause be remanded with directions to "discharge the accused" (R. 460), but later, after the Government had filed a petition for rehearing (R. 461–486), the opinion and judgment were "corrected" so as to "grant a new trial" (R. 489).

ARGUMENT

Petitioner contends (Pet. 17–26) that "since 'there was no verdict of guilty of false labeling within the charge of the information,' and since the petitioner 'was put in jeopardy on the charges of the several counts of the information and the jury was discharged without having rendered verdicts of guilty responding to the charges' (as stated in the opinion of the Court of Appeals * * *), and since the effect of such discharge of the jury 'is equivalent to acquittal' and since 'any further attempt to prosecute would amount to a second jeopardy, as to the charge with reference to which the jury has been silent' (as stated by this court in the *Selvester* case [170 U. S. 262, 269]), the petitioner

should have been discharged ir accordance with the original Opinion of the Court of Appeals" (Pet. 24). We submit that this contention is as "hypercritical and captious" as the District Court found petitioner's motion for judgment of acquittal to be.

The information charged petitioner with having violated Section 301 (a) of the Act, which prohibits the introduction or delivery for introduction into interstate commerce of a misbranded drug. The Court of Appeals properly held that there was no error in the conclusion of the District Court that the charge in each count was single and not duplicitous, since the offense charged was the introduction and delivery for introduction into interstate commerce, in violation of Section 301 (a) of the Act, of a drug which was misbranded in several particulars under Section 502 (R. 451).

Since each count designated the particulars in which the offense charged under Section 301 (a) had been committed, the jury was given the opportunity, by the forms of verdict submitted by the District Court, to determine whether the Government had proved each specification of misbranding. This Court has approved the use of special verdicts in treason cases (*Haupt* v. *United States,* 330 U. S. 631, 641; *Cramer* v. *United States,* 325 U. S. 1, 36), and, notwithstanding the opinion of the Court of Appeals, we see no reason why a special verdict

is not appropriate in a case of this kind. In any event, the forms of verdict submitted to the jury in no way prejudiced petitioner, but rather aided him. It is well settled that a charge of misbranding is established if the evidence proves any one of the representations made to be false. *United States* v. *One Device, etc.*, 160 F. 2d 194, 200 (C. A. 10). If the forms of verdict had not been submitted to the jury, they could have found petitioner guilty on each count on the basis of proof by the Government which sustained any one of the specifications of the ways in which the offense charged had been committed. The forms of verdict utilized permitted the jury to find specifically that petitioner had or had not violated the Act in designated respects.

Petitioner cannot claim jeopardy with respect to the charges on the basis of which he was convicted. For it is well established that when jeopardy has attached, if a defendant by his own act causes the verdict to be set aside, by that action he waives his constitutional protection against being twice put in jeopardy. E. g., *United States* v. *Ball*, 163 U. S. 662, 672; *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459, 462. Petitioner asserts (Pet. 24–25) that he did not waive his defense of former jeopardy since he withdrew his motion for a new trial made in the District Court and, in his brief filed in the Court of Appeals, stated that he reserved "his right to not again be tried or put

in jeopardy on or for any of the charges on which he was once tried and found 'not guilty' by the jury or on which the verdicts of the jury were silent." We are not aware of any authority, however, which holds that a defendant, by a mere assertion such as that made by petitioner, may limit his waiver of jeopardy when he appeals from a judgment against him. See *Trono* v. *United States,* 199 U. S. 521, 533. It is clear, also, that the findings of the jury that petitioner had not committed the offenses charged in Counts I and III in some of the particulars alleged did not place him in jeopardy with respect to the remaining specification, to-wit, the introduction into interstate commerce of a drug that was misbranded in that its labeling was false and misleading.[1]

At worst, the discrepancy between the use of the word "label" in the forms of verdict and the charge of misbranding in the labeling has resulted only in an imperfect verdict—a verdict which on its face neither establishes nor is inconsistent with the guilt or innocence of the defendant of the crime charged. Such a verdict is one upon which no legal conclusion can be reached and a new trial should properly be ordered.

[1] The specifications as to which petitioner was found not guilty would, of course, be eliminated on a new trial, either by way of amendment of the information (see Rule 7 (e), F. R. Crim. P.) or withdrawal by the court. And since only the specification of misbranding by false and misleading labeling remains, the question as to the use of special verdicts is no longer in the case.

United States v. *Buzzo,* 18 Wall. 125, 129;[2] *Houston* v. *United States,* 5 F. 2d 497 (C. A. 5); *United States* v. *Watkins,* Fed. Cas. No. 16, 649, 28 Fed. Cas. 419, 479.

The cases upon which petitioner relies to support his contention are readily distinguishable. They involved situations where the jury's verdict was silent as to one or more counts of an indictment (*Selvester* v. *United States,* 170 U. S. 262; *Dealy* v. *United States,* 152 U. S. 539; *State* v. *Yow,* 227 N. C. 585, 42 S. E. 2d 661), or as to a constituent element of the offense charged (*State* v. *Yow, supra;* cf. *Houston* v. *United States, supra*) or found the defendant guilty of an offense not known to the law (*Commonwealth* v. *Komatowski,* 347 Pa. 445, 32 A. 2d 905) or different from the offense charged (*Walters et al.* v. *Commonwealth,* 44 Pa. 135; *Ex Parte Muse,* 56 Okla. Crim. 232, 37 P. 2d 317; *People* v. *Arnarez,* 68 Cal. App. 645, 230 P. 193; *State* v. *Ward,* 147 La. 1083, 86 So. 552).

In the instant case, the jury's verdict was not silent in respect of the charge of misbranding by

[2] Petitioner cites this case as supporting his contention. Pet. 21. He relies on the concluding language of the opinion in which this Court said the case must be dismissed. The case came before the Court on a certified question. The Court said that since the verdict was silent as to an element of the offense it would be unavailing to decide the question and that an imperfect verdict must be set aside and a venire de novo, i. e., a new trial, ordered. The dismissal was of the case as it stood before the Court, not the information.

making false and misleading representations in the labeling, nor did the jury find petitioner guilty of an offense not charged. For, as the district court pointed out in its opinion denying petitioner's motion for judgment of acquittal, the evidence at the trial on this aspect of the case was addressed to the question whether the representations contained in the letters to the purchasers of the drug were false and misleading, there was no issue as to whether the labels themselves contained false and misleading statements, and the instructions to the jury referred to the letters and to the Government's contention that they constituted labeling and directed the jury to determine whether the statements contained in them were in fact false and misleading as alleged in the information. In these circumstances, it is clear, as the district court concluded, that the jury's findings of guilty on the first specification of misbranding as set forth in the forms of verdict submitted to them were tantamount to findings that the letters were false and misleading and, consequently, that the verdicts were responsive to the corresponding charges of Counts I and III. We think the Court of Appeals was wrong in setting aside the judgment and verdicts because of the district judge's oversight in using the word "label" instead of "labeling" in the forms of verdict, but assuming that this imperfection vitiated the verdicts, petitioner is not

entitled to the windfall he seeks of immunity from retrial for offenses of which he has been found guilty.[8]

[8] Petitioner's further complaint (Pet. 26–32) against the affidavit of the Assistant United States Attorney attached to the Government's petition for rehearing in the Court of Appeals (R. 487–488) and his assumption that this affidavit influenced the court to modify its judgment so as to grant a new trial, misconceives the relevance of the affidavit to that action of the court and to the question of former jeopardy which petitioner claims the modification evoked. This affidavit, and the rebuttal affidavit of petitioner's counsel in support of petitioner's application for reconsideration of the modified judgment (R. 504–507), were addressed to the question whether the suggestion to the district court that special verdicts be called for was made by the Government or the defense. They were relevant only to the issue of the propriety of the district court's action in requiring the jury to return special findings as to each specification of misbranding. The Court of Appeals decided this issue against the Government and it is obvious that the Government's petition for rehearing did not persuade it to change its decision, for the petition was denied. The modification of the judgment involved only the question whether the discrepancy between the charges of misbranding in the labeling and the findings of guilty of misbranding in the label precludes a new trial. As we have shown, the Court of Appeals was right in its ultimate decision that petitioner has no standing to claim former jeopardy.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

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